ISSUES IN FEDERAL LITIGATION

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Litigation and Employment Law Section

NGB-JA

Introduction

- Compensation for Correspondence Courses
- Litigating Butterbaugh USERRA Claims
- Electronic Discovery & FRCP Changes
- NSPS Update

CLARK

- Nature of case:
  - required to take courses as members of their state militias, while not in Federal service, and should be compensated under 37 U.S.C. § 206(a)

- Filed in the Court of Federal Claims

CLARK

- Why do you care?
- Tens of thousands of potential class members
- Potential Claims: $1.7 BILLION

CLARK

- At the time, § 206(d) provided that section 206(a) “does not authorize compensation for work or study performed by a member of a reserve component in connection with correspondence courses of a uniformed service.”

CLARK
OUR ARGUMENT

- NG members also dually enlisted as members of National Guard of the United States [“NGUS”]
- NGUS qualifies as a ‘reserve component,’
- Plaintiff is an NGUS member and thus a member of a reserve component, not warranting compensation for correspondence courses.

CLARK

- Their argument:

  “functions in the state National Guard and the federal National Guard of the United States are mutually exclusive”

Clark

- RESULT:
  - COFC grants our motion to dismiss
    - “as a member of the [NGUS], plaintiff is a member of a reserve component.”
    - Clark Appeals

CLARK

- Appellate court sides with Clark :

  “functions in the state National Guard and the federal National Guard of the United States are mutually exclusive.”

  Provisions of 206(d) do not apply

CLARK

- **CONGRESS RESPONDS**
  - **FY 06 NDAA**
  - Clarified that § 206(d)'s restriction applied to NG members "while not in Federal service."
  - inserted "**or by a member of the National Guard while not in Federal service**" after "reserve component."

CLARK

- Plaintiff: FY 06 NDAA's clarification could not be retroactive.
- **FY 07 NDAA:** clarified retroactivity

(A) any work or study performed on or after September 7, 1962, unless that work or study is specifically covered by the exception in paragraph (2); and (B) any claim based on that work or study arising after that date.

CLARK
Current Status

- Dec 2006: Plaintiff amends complaint to challenges 07 NDAA retroactivity
  - Congress usurping judicial role
  - Prior decisions “obligated Defendant to compensate” plaintiffs, and that 1 U.S.C. § 109 provides “this liability cannot be extinguished.”
  - Fifth Amendment Due Process violation

Litigating Butterbaugh USERRA Claims

- What is a Butterbaugh claim?

  Federal employee's claim of being improperly charged leave for reserve duty on non-work days.

BUTTERBAUGH

- Prior to Butterbaugh:
  - OPM interpreted 5 USC 6323 as allowing 15 CALENDAR days for military duty
  - In 2000, OPM changed interpretation to allow 15 WORK DAYS for military duty

BUTTERBAUGH

- In 2003, Butterbaugh filed his USERRA claim in the Fed Circuit seeking compensation for leave improperly charged prior to 2000

- Fed Circuit held that claims from 1980 until 2000 were cognizable as a USERRA claim but was silent regarding the statute of limitations

BUTTERBAUGH

- In 2005, DoD and DFAS establish an administrative claims procedure with a six year statute of limitations

- Early 2006, several MSPB decisions hold that there is no statute of limitations for a USERRA claim, allowing claims from 1980-2000

BUTTERBAUGH

- Oct 06, DoD and DFAS amend administrative procedures eliminating six-year statute of limitations

BUTTERBAUGH

- ADMIN CLAIM PROCEDURE
  - Claimant has the burden of proof to show they were harmed.
    - “Harmed” = improperly charged leave
    - Proof:
      - active duty military orders
      - civilian leave records
      - payroll records
      - Other records indicating an improper charge (RPAS)

BUTTERBAUGH

- ADMIN CLAIM PROCEDURE
  - Submit Admin claim form (see DFAS memo)
    - Supporting paperwork
  - DFAS Indianapolis
    - Will scan and flow to appropriate office

BUTTERBAUGH

- How is the employee made whole:
  - If still employed: leave restored
    - must be used within two years of restoration
  - If not still employed: monetary compensation
    - equivalent to lost leave at the time the leave was lost

BUTTERBAUGH

- ISSUES:
  - DFAS usually maintains records for 6 years
  - Technicians cannot bring USERRA claim before the MSPB or in federal court.
  - Fiscal law issues (Contact DFAS-GC)

BUTTERBAUGH TECHNICIAN ISSUES

- USERRA, Section 4303 defines Technician's employer as the AG

- Dept of Labor considers a technician a state employee for USERRA purposes (Fed Reg, vol. 70, no. 242)

BUTTERBAUGH TECHNICIAN ISSUES

- Sect 1002.305(d): an action against a State AG as technician's employer is an action against the State.

- 38 USC 4323: action must be brought in state court, not federal court or before the MSPB.

BUTTERBAUGH

- Dec 2006 NGB-J1 All States Memo:

  Settlement authority rests with State TAG

  Prior to settlement TAGs must consult with NGB-J1-TN

E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- **“Electronically stored information” (ESI)**
- **Forms of electronic production**
- **Discovery of ESI “not reasonably accessible”**
- **Inadvertent production and waiver of privilege**
- **“Safe Harbor” – Limit on sanctions for loss of electronic**
- **information in routine, good-faith retention programs**

E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- Early Meet and Confer:

- Rule 16(b) – Confirms the court's ability to address ESI discovery issues in 16(b) orders

ELECTRONIC DISCOVERY DEFINED

- **A Few Examples…**
  - Email and attachments
  - Text files, such as Word, Excel, PowerPoint, Access
  - Transmissions and data
  - stored on BlackBerries and PDAs
  - Backup tapes
  - Proprietary applications and Databases
  - Internet cache files, cookies
  - Instant and text messages
  - Voicemail
  - Videotape
  - Data stored on cell phones

E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- Early Meet and Confer:
- Rule 26(f) – parties must confer and develop a discovery plan addressing ESI

  – Include “form or forms” of production Image based? Native? Inclusion of metadata?

  – Include waiver of privilege issues

METADATA

TO: Hon. David Levi <david_levi@caed.uscourts.gov>
FROM: Ken Withers <kwithers@fjc.gov>
DATE: 6 Mar 2002
SUBJECT: Pike & Fischer/BNA Slides

Judge Levi:

I am preparing some slides for you to use at the upcoming Pike & Fischer/BNA conference on electronic discovery. Did you want to include any discussion of the Magistrate Judges Survey or other Rules Committee activities?

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METADATA

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From ???@??? Thu Mar 07 07:12:53 2002
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        by athens.bitwise.net (8.9.3/8.9.3) with SMTP id QAA27822
        for <ken@kenwithers.com>; Wed, 6 Mar 2002 16:20:34 -0500
From: kwithers@fjc.gov
Received: from rain.fjc.dcn by cloud.fw; Wed, 06 Mar 2002 21:28:48 GMT
Subject: Pike & Fischer/BNA Slides
To: David_Levi%ccMail@fjc.gov
X-Mailer: Lotus Notes Release 5.0.8  June 18, 2001
Message-ID: <OF55646B59.E4368010-ON85256B74.0074FB65@fjc.dcn>
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 04:20:33 PM
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E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- Accessible v. Inaccessible
- Rule 26(b)(2)(B)
  - Party may object to discovery of ESI "not reasonably accessible because of undue burden or cost"
  - If confronted with a motion to compel, party must then demonstrate inaccessibility and, for good cause, may still be subject to judicial discovery order
  - Cost shifting/sharing?

E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- Rule 26(b)(5)(B) “clawback”
  – Producing party may give notice that records are privileged despite *inadvertent* production
  – Receiving party must destroy or sequester the records until judicial disposition
  – *Hopson v. City of Baltimore,* 232 F.R.D. 228 (D. Md. 2005)

E-DISCOVERY CHALLENGE: FRCP OVERVIEW

- Rule 37(f)

–a court may not sanction for lost information resulting from routine, good-faith operation of an electronic information system.

NSPS-UPDATE

- DoD began phased spirals in April 06
- NGB Title 5 non-bargaining unit March 07
- NG Title 32 workforce October 07

NSPS-UPDATE

- Our expectations:
  - Increased grievances - litigation
    - pay-banding decisions.
  - Initial increase in EEOC claims (Techs)
    - pro-pay and bonus decisions

Questions?